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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
Petitioners,

v.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONERS IN REPLY TO BRIEFS AMICI CURIAE OF THE UNITED STATES, STATE OF NEW YORK AND NEW ENGLAND LEGAL FOUNDATION

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This brief of the petitioners (collectively "Milwaukee") replies to the briefs of the respondents' supporting amici, namely, the New England Legal Foundation[1], the Solicitor

[1] To the extent that the amicus brief of New England Legal Foundation deals with FWPCA, as distinguished from problems it is litigating under the Clean Air Act, its arguments are met in the various sections of this brief and Milwaukee's reply to respondents' brief which deal with FWPCA. The short answer to the Foundation is that where FWPCA and federal administrative determinations made thereunder establish permitted conduct in a proceeding in which all interested parties have an opportunity to be heard, it would be anomalous and unwise to afford those same parties the opportunity to proceed in the federal courts under the guise of a "federal common law" to secure relief they chose not to seek in the federal statutory proceedings.

General of the United States and the Attorney General of the State of New York.

ARGUMENT

I. THE SOLICITOR GENERAL'S BRIEF IS MISLEADING.

The Solicitor General has shown little interest in this case. In his response to this Court's initial invitation to state the position of the United States, he suggested that this Court deny review. When this Court granted Milwaukee's petition for review, the Solicitor General assigned the matter for briefing and argument to a junior staff member. As a result the person principally responsible for the brief (see the statement of the Solicitor General in support of the motion to admit Andrew J. Levander *pro hac vice*) is a staff attorney of approximately two years standing.

This may explain why the argument that Sec. 505 of FWPCA (§ 1365) "expressly preserves" the federal common law is based in significant measure on a purported but incorrect quotation of Senator Muskie appearing at page 24 of the Solicitor General's brief, vis.:

> "For example, in a colloquy on the floor of the Senate, Senator Griffin inquired whether passage of the Clean Water Act would affect in any way the then ongoing Reserve Mining Company litigation. 1 Leg. Hist. 191. The Senator specifically noted that this suit, which concerned the discharge of taconite tailings into Lake Superior, was based in part on the federal common law of 'public nuisance' (*ibid.*) See *Reserve Mining Co.* v. *EPA*, 514 F.2d 492, 501 (8th Cir. 1975). Consistent with the position taken by EPA, Senators Muskie [32] and Hart replied that the Clean Water Act would not affect or hinder 'the suit now pending against the Reserve Mining Co., under the Refuse Act of 1899***[,] the existing Federal Water Pollution Control Act or *other law*.' 1 Leg. Hist. 211 (emphasis supplied). See 1 Leg. Hist. 191-194; Senate Hearings, Pt. 1, at 1017-1020.

> See also 1 Leg. Hist. at 248 (similary colloquy between Reps. Dingell and Wright)." (Emphasis in the original.)
>
> Footnote 32 reads:
>
> "[32] Senator Muskie was the primary author of the Clean Water Act and his views are therefore entitled to particular weight. See, *e.g., E. I. duPont deNemours & Co.* v. *Train, supra,* 430 U.S. at 129; *Simpson* v. *United States,* 435 U.S. 6, 13 (1978)."

In this fashion the Solicitor General's brief emphasizes the purported fact that Senator Muskie, the primary author of the 1972 FWPCA amendments, said the suit against Reserve Mining under "other law" would not be affected by enactment of the amendments. In fact, the legislative history bears out neither the argument, the quotation cited, nor the attribution of that quotation to Senator Muskie. Senator Muskie did not utter the phrase "or other law"; Senator Muskie referred to "any other acts of Congress". The argument also attributes to Senator Griffin a reference to "the federal common law of 'public nuisance'" though Senator Griffin never mentioned federal common law.

Senator Griffin did speak about the *Reserve Mining* case.[2] However, his statement of concern mentioned only in passing allegations based on "violation of water quality standards and the allegation that such dumping constitutes a public nuisance." At no time did Senator Griffin mention whether the water quality standards or the public nuisance he was concerned with were federal or state in character. His real concern was with the aspects of the suit resting

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[2] It is significant, but not referred to by the Solicitor General's brief, that when the issue of the federal common law was dealt with by the Court of Appeals for the Eighth Circuit, it said: "[W]e deem it unnecessary and, indeed, unwise, to also rely on federal nuisance law." *Reserve Mining Co.* v. *EPA,* 514 F.2d 492, 532 (1975).

on the Refuse Act of 1899. He never inquired in respect of common law implications, much less as to the effect on federal, as distinguished from state, common law. He never mentioned, and nowhere does the legislative history deal with, "federal common law." The significant portions of what Senator Griffin in fact said follow.

Senator Griffin said:

> "However, when these provisions [Secs. 4 and 402(k) (§ 1342(k))] are read together, it is not altogether clear what effect is intended with respect to pending Federal court suits against polluters violating the Refuse Act of 1899.
>
> If section 402(k) were read as having retroactive effect, then about 170 Federal suits filed against polluters prior to the date of enactment of the bill, including the Reserve case, could be dismissed.
>
> It is true that the suit against Reserve Mining is also based upon violations of water quality standards and the allegation that such dumping constitutes a public nuisance. However, the strongest part of the case is based on the Refuse Act.
>
> * * *
>
> [I]t is inconceivable that the Senate would want to emasculate the best available enforcement device now available—the Refuse Act—and legislatively dismiss suits pending under it." *Legislative History* at 191.[3]

Senator Muskie replied as follows:

> "Section 4 provides and I quote the relevant words pertaining to the Refuse Act:
>
> > No suit, action, or other proceedings lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity . . . shall abate by reason of

[3] All citations to the legislative history are to "A Legislative History of the Water Pollution Control Act Amendments of 1972," prepared by the Environmental Policy Division of the Congressional Research Service of the Library of Congress (Committee Print 1973).

> the taking effect of the amendment made by section 2 of this Act.
>
> Without any question it was the intent of the conferees that this provision include enforcement actions brought under the Refuse Act, the Federal Water Pollution Control Act, *and any other acts of Congress.*" (Emphasis added.) *Id.* at 193.

This colloquy concluded as follows:

> "Mr. Griffin. I thank the manager of the bill. Certainly that does clarify the meaning as to the intent of the conferees, and it would clearly indicate that the suit now pending against the Reserve Mining Co. *under the Refuse Act* would not be affected by this bill." (Emphasis added.) *Id.* at 194.

Simultaneously, the following statement was made by Representative Wright in the House:

> "Section 4 provides and I quote the relevant words pertaining to the Refuse Act:
>
> > 'No suit, action, or other proceeding lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity . . . shall abate by reason of the taking effect of the amendment made by section 2 of this Act.'
>
> Without any question it was the intent of the conferees that this provision include enforcement actions brought under the Refuse Act, the Federal Water Pollution Control Act, *and any other acts of Congress.*" (Emphasis added.) *Id.* at 248.

Note that the language of Senator Muskie's response is identical to the response of Representative Wright. Both were responding to a question relating to the effect of Sec. 402(k) on pending litigation under the Refuse Act of 1899. Both limited their response to the statement that Sec. 402(k) would not preclude continuation of pending litigation under the Refuse Act, the Federal Water Pollu-

tion Control Act or "any other acts of Congress." Neither mentioned the common law, much less the *federal* common law.

After Senator Muskie spoke, later that day Senator Hart paraphrased what Senator Muskie had said as follows:

> "Alarm has been voiced that efforts to prevent environmental damage to Lake Superior involving the discharge of taconite tailings by Reserve Mining Co., will be hindered by this legislation. It is my understanding, however, after the explanation of the Senator from Maine, that the suit now pending against the Reserve Mining Co., under the Refuse Act of 1899 will in no way be affected nor will any of the other counts under the existing Federal Water Pollution Control Act *or other law.*" (Emphasis added.) *Id.* at 211.

Thus, not only is the attribution to Senator Muskie incorrect, but the gravity of that incorrect attribution is multiplied significantly by both footnoting Senator Muskie's primary authorship of the Act and italicizing the phrase "other law" which is Senator Hart's phrase, not Senator Muskie's phrase.

Note that the Solicitor General's brief at 23 states:

> "In addition, the contemporaneous legislative debates and hearings demonstrate that Congress specifically focused on the *federal* "common law of water pollution abatement" (1 Leg. Hist. 688) and concluded that enactment of the Clean Water Act would not limit or preclude such suits." (Emphasis added.)

Here the word "federal" has been inserted to modify the phrase "common law of water pollution abatement." Milwaukee said in its initial brief that the entire legislative history failed to use that modifier. Thus, the insertion of the modifier "federal" to introduce the mischaracterization of the legislative history at page 24 of the Solicitor General's brief adds an element to the mischaracterizations which is cause for serious concern.

The Solicitor General's brief presents other misleading arguments. At page 7 it states:

> "No regulations exist, however, regarding the allowable discharge of viral and bacterial pathogens, fecal coliforms, or phosphorous and chlorine residuals."

The obvious purpose of this statement is to suggest that an interstice exists in FWPCA and the regulations thereunder which the federal common law should fill. In fact, the discharge permits issued to Milwaukee under FWPCA specifically address fecal coliforms, phosphorous and chlorine residuals, as well as various other parameters (e.g., BOD, suspended solids, pH, etc.) and thereby by reference thereto address pathogens. P.Ex. 62, 63 and 64, App. 371-454, Tr. 257. There is no interstice here.

Interestingly, this very same argument was advanced by Illinois in its May 10, 1979 Application for Rehearing and Suggestion for Rehearing In Banc to the Court of Appeals. There Illinois claimed that neither federal regulations nor the discharge permit limitations were designed to protect the public health. In response to that claim, *the EPA itself* came forward with an affidavit from Mr. Charles Sutfin, now Director of EPA's Region V Water Division, who drafted EPA's "secondary treatment" standards applicable to publicly owned treatment works. That affidavit shows that the pertinent federal regulations were designed to accomplish the removal or inactivation of pathogens in treatment plant effluent so as to protect the public health. See Response of Defendants-Appellants to Petition for Rehearing with Appendix, dated May 29, 1979, at Ap. 5-6. Similarly, the State of Wisconsin specifically addresses pathogen removal or inactivation when establishing NPDES permit limitations. *Id.* at Ap. 7-8. Finally, applicable Wisconsin water quality and treatment standards promulgated pursuant to FWPCA are expressly designed to protect the public health. Sections NR 102.02-102.03, 103.06, 110.23, 210.09, Wis. Adm. Code.

The Solicitor General's brief does go on to admit at the same page 7 that the matters which are before this Court on this Petition for Certiorari are covered by FWPCA. At footnote 15 on page 7, he specifically says:

> "Such overflows [from combined storm and sanitary sewers] must be covered by a permit and must comply with Sections 301(b)(1)(A) and 301(b)(2)."[4]

The Solicitor General's brief at 14-15 argues that the EPA believes that the federal common law is an important tool to advance the goals of FWPCA. But the Solicitor General fails to state that the EPA, which is committed by Sec. 201 of FWPCA (§ 1281) to fund the goals of the Act, is resisting to the utmost paying for any court-imposed requirements which exceed the requirements that the EPA or qualified states impose under FWPCA. Can the Solicitor General and the EPA have it both ways?

II. THE SOLICITOR GENERAL AGREES WITH MILWAUKEE IN THIS COURT'S CASE 80-12.

The Solicitor General's position in this case is contrary to statements made in his petition for certiorari in *Environmental Protection Agency, et al.* v. *National Sea Clammers Association, et al.*, No. 80-12, cert. granted October 20, 1980. There, in responding to the Court of Appeals' decision establishing an implied right of action under FWPCA, which action is not subject to the procedural requirements of Sec. 505, the Solicitor General stated at 15:

> "This focus [in FWPCA] on agency enforcement is undermined by the decision of the court of appeals. . . .

---

[4] The Solicitor General's brief at 8n.16 incorrectly asserts that Illinois has established a higher water quality standard for Lake Michigan than has Wisconsin. In fact, both states have established a water quality standard of "fishable, swimmable and drinkable." See Sec. NR 103.06, Wis. Adm. Code (and related Secs. NR 102.02 (3), (4) and (5), Wis. Adm. Code) and Ill. Water Poll. Control Bd. Rules and Regs. ch. 3, Part 206 (and related Parts 203 and 204, Ill. Water Poll. Control Bd. Rules and Regs.).

> Under the court of appeals' decision, even when EPA is diligently pursuing a court action against an alleged violator, a private litigant will be free to bring a second action, which may be in a different court because it is not subject to the venue requirements of the statutory provisions."

The general problem posed by the Solicitor General in *National Sea Clammers* is the same problem present in this case. Whether the authority of the "private litigant" to pursue the second action is implied from the provisions of FWPCA or is based upon the federal common law, the problem is the same. Were it not for the asserted availability of a sovereign immunity defense to a federal common law action, the Solicitor General would undoubtedly have included an objection to such an action in its petition in *National Sea Clammers*. Again the Solicitor General would have it both ways.

III. UNDER THE DOCTRINE OF PRIMARY JURISDICTION, THIS CASE SHOULD HAVE BEEN REFERRED TO THE EXPERT AGENCIES HAVING FWPCA AUTHORITY.

The Solicitor General argues against primary jurisdiction referral because (1) nuisance claims are within the conventional experience of the federal courts, and (2) this case does not call upon the special expertise of the EPA, relying principally upon *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290 (1976). (Solicitor General's Brief at 29-30 n.40.) [5]

However, the District Court candidly stated that it did not understand the technical evidence. Pet. App. F-3 and 4. This is the very problem calling for referral.

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[5] Michigan's brief also addresses primary jurisdiction at 19-20.

Nader v. *Allegheny Airlines, Inc., supra* at 303-304, is not dispositive. There the Court stated:

> "Even when common-law rights and remedies survive . . . it may be appropriate to refer specific issues to an agency for initial determination where . . .
>
> > 'the limited functions of review by the judiciary [would be] more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.' *Far East Conference* v. *United States,* 342 U.S. at 574-575, 96 L.Ed 576, 72 S.Ct. 492.
>
> See also *United States* v. *Western Pacific R. Co., supra,* at 64, 1 L.Ed.2d 126, 77 S.Ct. 161, 426 U.S. at 303-304."

The Court went on to point out that in the *Nader* case (contrary to the situation here) the expertise of the agency involved would not be helpful in resolving the issues before the Court. 426 U.S. at 305-306.

As pointed out in Milwaukee's initial brief at 11, here Illinois had actual notice of, and could have participated in, the NPDES permit proceedings (including a public hearing) where all of the technical matters could have been heard and determined by the qualified expert administrative agencies specifically created for that purpose.

Even if those proceedings were not dispositive of the issues presented, the agencies' expert input, based upon an extensive record on the precise issues now before the Court (including whether the discharges did in fact affect Illinois, how serious any potential risk actually was, and whether the benefits of potential remedies justified the cost thereof) would have provided the specific expertise the District Court admittedly lacked on the issues it decided.

IV. NEW YORK ARGUES A CASE NOT BEFORE THE COURT.

The brief amicus curiae of the Attorney General of the State of New York is directed to an issue not before this Court. In its "Statement of Interest" New York exposes its true concern: "In *certain circumstances,* a federal common law public nuisance action may be the *only* path open to a state government which seeks to resolve an apparent interstate conflict." (Emphasis supplied.) N.Y. Brief at 1. The brief then offers a "hypothetical" fact situation involving toxic waste disposal. *Id.* at 1-2. The burden of the brief is to establish that the states retain the option of going to federal court to seek a remedy for an injury which an administrative agency acting under federal statutes does not address. *Id.* at 20. Thus, the New York brief is really addressed to the so-called "Love Canal" case. See the citations to *United States* v. *Hooker Chemicals & Plastics Corp., et al.,* Civil Action Nos. 79-987, 79-988, 79-989 and 79-990 (W.D.N.Y.) at page 9 of New York's brief.

"Love Canal" does not entail the discharge of "conventional pollutants" (BOD, suspended solids, fecal coliform and pH) by a publicly owned treatment works or other publicly maintained point source pursuant to and in accordance with a discharge permit issued in compliance with the provisions of the FWPCA. It is not, and should not be, incumbent upon Milwaukee to brief, argue and prevail in every imaginable hypothetical fact situation, regardless of the presence or absence of regulation or statute in the premises, in order to prevail in the present certiorari proceeding pending before this Court on a narrow issue under a specific statutory scheme.

A decision favorable to Milwaukee, limited as it should be to the issues before this Court, will in no way decide the so-called "hypothetical" fact situation argued by New York. In contrast to the "Love Canal" situation, we here deal with permittees under an all pervasive federal statute

and federal regulatory scheme directed to the precise matters before the Court. New York's case is not before the Court.

CONCLUSION

The briefs of the respondents' supporting amici add little if any illumination to the issues before the Court. In each instance they are calculated to advance a position of the writer in an area of the law or under a statute not presented here and not controlled by a decision directed to the relatively narrow issues that are presented. On this basis Milwaukee respectfully suggests that those briefs should be used only as guideposts to mark the outer perimeters of the issues before the Court and the limits of the decision rendered.

Respectfully submitted,

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